

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE NEW YORK TIMES COMPANY,
JESSE MCKINLEY, and VIVIAN YEE,

Petitioners,

-against-

NEW YORK STATE EXECUTIVE CHAMBER,

Respondent.

For a judgment pursuant to Article 78 of
the Civil Procedure Law and Rules

Index No.

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

This Article 78 proceeding seeks to vindicate the right of Petitioners The New York Times Company (“The Times Company”) and its journalists Jesse McKinley and Vivian Yee to lawfully access public information in the possession of New York State Executive Chamber (the “Chamber”). This proceeding also seeks injunctive relief, pursuant to Article 78, determining that the Chamber has violated Public Officers Law §§ 84, *et seq.* (the “Freedom of Information Law” or “FOIL”) and ordering the Chamber to comply with the law.

Petitioners, by their attorneys, respectfully allege that:

1. This is a special proceeding brought against the Respondent, the Chamber, pursuant to Article 78 of the C.P.L.R. and FOIL.
2. This action arises out of the Chamber’s refusal to allow Petitioners to inspect and copy a variety of records identified in four of Petitioners’ FOIL requests.

Parties and Jurisdiction

3. Petitioner The Times Company is the publisher of *The New York Times*, the largest seven-day-a-week newspaper in the United States. The Times Company's reporters actively cover government, law enforcement, crime, and other social and political issues throughout New York State.

4. Petitioners McKinley and Yee submitted the four FOIL requests at issue in this petition to the Chamber on behalf of The Times Company.

5. Respondent the Chamber is a government agency administered under New York Codes, Rules and Regulations, Title 9, that encompasses the Office of the Governor. The Chamber is a public agency subject to the requirements of FOIL.

6. The actions of the Chamber complained of herein are final in nature and cannot be adequately reviewed by another court, entity, or officer.

7. This Court has jurisdiction over this matter pursuant to Article 78 of the C.P.L.R. and PUB. OFF. LAW § 89(4)(b).

Venue

8. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in Albany County, the judicial district in which the respondent made the negative determination and where the principal office of the respondent is located.

Facts

The Malatras-Howe Emails FOIL Request

9. On June 3, 2016, on behalf of The Times Company, Petitioner McKinley, a *New York Times* reporter, submitted a request under FOIL to the Chamber, seeking: "Any e-mail correspondence between state operations director Jim Malatras and lobbyist Todd R. Howe, of

WOH Government Solutions, both to and from these email addresses – Jim.Malstras@exec.ny.gov and thowe@woh-solutions.com – between the dates of January 1, 2011 through to June 1, 2016” (the “Malstras-Howe Emails Request”) (Affidavit of Jesse McKinley (“McKinley Aff.”) ¶ 2 (January 12, 2017).)

10. In response, the Chamber issued a letter on August 8, 2016, denying the request in full. (*Id.* ¶ 3.)

11. On August 31, 2016, The Times Company filed an administrative appeal on behalf of Petitioner McKinley challenging the Chamber’s denial. (*Id.* ¶ 4.)

12. The Chamber denied the appeal on September 19, 2016. (*Id.* ¶ 5.)

The Percoco Schedules FOIL Request

13. On July 12, 2016, on behalf of The Times Company, Petitioner Yee, a *New York Times* reporter, submitted a FOIL request to the Chamber, seeking: “Daily schedules for the years 2011, 2012, 2013, 2014, and 2015 for Joseph Percoco,” including “calendars kept by Mr. Percoco or by his secretaries, aides, or schedulers” (the “Percoco Schedules Request”). (Affidavit of Vivian Yee (“Yee Aff.”) ¶ 2 (January 12, 2017).) Mr. Percoco is a former executive deputy secretary to Governor Andrew Cuomo. (*Id.* ¶ 3.)

14. The Chamber, on August 16, 2016, denied the Percoco Schedules Request in full. (*Id.* ¶ 4.)

15. On August 31, 2016, The Times Company filed an administrative appeal on behalf of Petitioner Yee challenging the Chamber’s denial. (*Id.* ¶ 5.)

16. The Chamber denied the appeal on September 20, 2016. (*Id.* ¶ 6.)

The Percoco Return Records FOIL Request

17. On July 12, 2016, on behalf of The Times Company, Petitioner Yee submitted a FOIL request to the Chamber, seeking: “Any and all records pertaining to Joseph Percoco’s return to the Executive Chamber in 2014, including any resume, employment questionnaire, financial disclosure forms, job application, background check, or other materials” (the “Percoco Return Records Request”). (Yee Aff. ¶ 7.) Mr. Percoco left his position as an aide to Governor Cuomo in April 2014 to run the governor’s re-election campaign. He returned to his government post in or about late 2014. (*Id.* ¶ 8.)

18. The Chamber, on August 16, 2016, denied the Percoco Return Records Request in full. (*Id.* ¶ 9.)

19. On August 31, 2016, The Times Company filed an administrative appeal on behalf of Petitioner Yee challenging the Chamber’s denial. (*Id.* ¶ 10.)

20. The Chamber denied the appeal on September 19, 2016. (*Id.* ¶ 11.)

The Percoco Emails FOIL Request

21. On June 3, 2016, on behalf of The Times Company, Petitioner McKinley submitted a FOIL request to the Chamber, seeking: “Any e-mail correspondence – either incoming or outgoing – between the following email: perc15@aol.com; and these members of Executive Branch staff, and their respective emails (listed below): Jim Malatras, Director of State Operations: Jim.Malatras@exec.ny.gov; Former Deputy Director of State Operations for Policy Andrew Kennedy: Andrew.Kennedy@exec.ny.gov; William Mulrow, Secretary to the Governor, Bill.Mulrow@exec.ny.gov. This request is for emails between the dates of January 1, 2014 through to January 8, 2016” (the “Percoco Emails Request”). (McKinley Aff. ¶ 6.) The email address perc15@aol.com was used by Mr. Percoco during the relevant time period. (*Id.* ¶ 7.)

22. In response, the Chamber, on September 7, 2016, asked that Petitioner McKinley “clarify and narrow” his request. Specifically, the Chamber asked that he “identify the specific topics or search terms so that [the Chamber FOIL officer could] continue a search for responsive records.” (*Id.* ¶ 8.)

23. By email, Petitioner McKinley, on September 15, 2016, furnished the Chamber with a list of specific search terms. (*Id.* ¶ 9.)

24. On October 4, 2016, the Chamber denied the Percoco Emails Request in full. (*Id.* ¶ 10.)

25. The next day, on October 5, 2016, The Times Company filed an administrative appeal on behalf of Petitioner McKinley challenging the Chamber’s denial. (*Id.* ¶ 11.)

26. The Chamber denied the appeal on October 21, 2016. (*Id.* ¶ 12.)

The Chamber’s Rationale

27. The Chamber denied each of the four FOIL requests on the same grounds: the requested records, if they exist, are exempt from disclosure under N.Y. PUB. OFF. LAW § 87(2)(e). (McKinley Aff. ¶¶ 3, 10; Yee Aff. ¶¶ 4, 9.) Section 87(2)(e) contains four exemptions from FOIL’s general disclosure requirement for records or parts of records that “are compiled for law enforcement purposes.” In none of its denial letters did the Chamber specify which of these four exemptions it was invoking. (*Id.*)

28. The two grounds on which The Times Company appealed each of the Chamber’s four denials were similarly uniform. *First*, The Times Company contended that the requested records had not been “compiled for law enforcement purposes” within the meaning of FOIL. *Second*, The Times Company maintained that the records did not satisfy the additional elements of any of the four exemptions set forth in § 87(2)(e). (McKinley Aff. ¶¶ 4, 11; Yee Aff. ¶¶ 5, 10.)

29. The Chamber's denials of The Times Company's four administrative appeals relied principally on one § 87(2)(e) exemption: the exemption applicable to records compiled for law-enforcement purposes that "if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings." N.Y. PUB. OFF. LAW § 87(2)(e)(i). That FOIL exemption, the Chamber suggested, shielded from disclosure even the fact of the existence of records responsive to Petitioners' requests. (McKinley Aff. ¶¶ 5, 12; Yee Aff. ¶¶ 6, 11.)

30. The Chamber declared that it had received a subpoena from federal prosecutors in Manhattan and that it was "under an additional independent investigation." The Chamber explained that it "was, and still is, cooperating with both investigations at the time of the FOIL request." (*Id.*)

31. In denying The Times Company's appeal of the Percoco Emails Request (*see supra* ¶¶ 21-26), the Chamber also observed that federal prosecutors in Manhattan and the New York Attorney General's Office had filed complaints "in connection with the subject matter of the investigation[s]," which the Chamber said further supported its denial of the Percoco Emails Request. (McKinley Aff. ¶ 12.)

32. In the four denials, the Chamber also claimed that it "reserved the right" to assert FOIL exemptions codified at Public Officers Law §§ 87(2)(e)(ii), 87(2)(e)(iii), and 89(2)(b), but it did not actually invoke those exemptions or explain their applicability. (McKinley Aff. ¶¶ 5, 12; Yee Aff. ¶¶ 6, 11.)

33. Section 87(2)(e)(ii) applies to records compiled for law-enforcement purposes that, if disclosed, would "deprive a person of a right to a fair trial or impartial adjudication." Section 87(2)(e)(iii) applies to records compiled for law-enforcement purposes that, if disclosed, would "identify a confidential source or disclose confidential information relating to a criminal

investigation.” Lastly, § 89(2)(b) provides a non-exhaustive list of scenarios where disclosure might constitute an “unwarranted invasion of personal privacy.” That provision is relevant because § 87(2)(b) contains an exemption from disclosure for records or parts of a record that, “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [§ 89(2)].” The Chamber did not cite to § 87(2)(b) in its appeal-denial letters. (McKinley Aff. ¶¶ 5, 12; Yee Aff. ¶¶ 6, 11.)

COUNT I

34. Petitioners hereby repeat and reallege paragraphs 1 through 33 as if fully set forth herein.

35. Like all state records, the records sought in the Malatras-Howe Emails Request are presumed public under FOIL.

36. No FOIL exemptions permit the withholding of these records.

37. Alternatively, to the extent that any exemption applies, the Chamber is required by FOIL to segregate the non-exempt sections of the records and produce those sections to Petitioners.

38. Petitioners are entitled to an order directing the Chamber to produce, in full or in part, the documents that have been withheld.

COUNT II

39. Petitioners hereby repeat and reallege paragraphs 1 through 33 as if fully set forth herein.

40. Like all state records, the records sought in the Percoco Schedules Request are presumed public under FOIL.

41. No FOIL exemptions permit the withholding of these records.

42. Alternatively, to the extent that any exemption applies, the Chamber is required by FOIL to segregate the non-exempt sections of the records and produce those sections to Petitioners.

43. Petitioners are entitled to an order directing the Chamber to produce, in full or in part, the documents that have been withheld.

COUNT III

44. Petitioners hereby repeat and reallege paragraphs 1 through 33 as if fully set forth herein.

45. Like all state records, the records sought in the Percoco Return Records Request are presumed public under FOIL.

46. No FOIL exemptions permit the withholding of these records.

47. Alternatively, to the extent that any exemption applies, the Chamber is required by FOIL to segregate the non-exempt sections of the records and produce those sections to Petitioners.

48. Petitioners are entitled to an order directing the Chamber to produce, in full or in part, the documents that have been withheld.

COUNT IV

49. Petitioners hereby repeat and reallege paragraphs 1 through 33 as if fully set forth herein.

50. Like all state records, the records sought in the Percoco Emails Request are presumed public under FOIL.

51. No FOIL exemptions permit the withholding of these records.

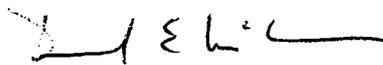
52. Alternatively, to the extent that any exemption applies, the Chamber is required by FOIL to segregate the non-exempt sections of the records and produce those section to Petitioners.

53. Petitioners are entitled to an order directing the Chamber to produce, in full or in part, the documents that have been withheld.

WHEREFORE, Petitioners respectfully request that this court enter judgment on their behalf:

- a. declaring that the Chamber's denial of the requested documents violates FOIL;
- b. ordering the Chamber to grant Petitioners immediate access to a copy of the files;
- c. awarding attorney's fees and costs;
- d. granting to Petitioners such other and further relief as this court deems just and proper.

Dated: New York, NY
January 12, 2017



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